In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 713.

ESTATE OF JOHN B. HASKINS, deceased,
H. KEITH HARBER, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

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TABLE OF CONTENTS.

Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting Writ	5
An Important Question of Federal Law Never Settled by the United States Supreme Court is Involved	6
The Circuits are in Conflict on This Question	7
Conclusion	9
Appendix:	
Opinion of the United States Court of Appeals for the Sixth Circuit	11
Judgment of the United States Court of Appeals for the Sixth Circuit	13

TABLE OF AUTHORITIES.

Cases.

Bronson v. Commissioner, 183 F. 2d 529	8
Davis v. Commissioner, 184 F. 2d 86	7
Delone v. Commissioner, 100 F. 2d 507	8
Eagle v. Commissioner, 242 F. 2d 635	9
Wiseley v. Commissioner, 185 F. 2d 263	9

Statutes.

26 U. S. C. 275(a)	2
26 U. S. C. 275(c)	2, 3, 7
26 U. S. C. 276(a)	3
26 U. S. C. 293(b)	2, 6, 7, 8
26 U. S. C. 1112	2
28 U. S. C. 1254(1)	1

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered October 25, 1957, which affirmed the judgment of the Tax Court of the United States in the above entitled case.

OPINIONS BELOW.

The findings of fact and opinion of the Tax Court of the United States are not reported, but appear at pp. 140a to 156a, inclusive, of Appendix in Court below, nine extra copies of which are filed herewith. The opinion and order of the Court of Appeals is not yet reported. Copies are attached hereto at pp. 11 to 13.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Was the Court of Appeals correct in ruling that substantial omissions of income over a six year period resulting from errors of taxpayer's agents, employees and certified public accountant, standing alone, constitute imputed knowledge to the taxpayer and therefore substantial evidence upon which to base the imposition of the fifty (50%) percent fraud penalty contemplated by 26 U. S. C. 293(b)?

STATUTES INVOLVED.

Title 26, Internal Revenue Code, Section 293(b), U. S. C. A. provides:

> Additions to the tax in case of deficiency. (b) Fraud. If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such defiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

Title 26, Internal Revenue Code, Section 1112, U. S. C. A. provides:

> 1112. Burden of proof in fraud cases. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

Title 26, Internal Revenue Code, Section 275(a) and (c) U. S. C. A. provides:

> Section 275. Period of limitation upon assessment and collection.
>
> (a) General rule. The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding

in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(c) Omission from gross income. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

Title 26, Internal Revenue Code, Section 276(a) U. S. C. A. provides:

Section 276. Same—Exceptions.

(a) False return or no return. In the case of a false or fraudulent return with intent to evade tax or a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

STATEMENT.

This case was initiated in the Tax Court of the United States by petition for a redetermination of deficiencies and penalties as set forth in respondent's notice of deficiency. The findings of fact of the trial court (140a to 156a, inclusive of appendix of court below) were not controverted except in respect to one evidentiary finding of fact on which the Court had no evidence to base such finding and one ultimate fact on which the only evidence was substantial omission. The former finding was that the decedent examined his tax return each year when the only evidence established that he did not. The latter was that decedent was guilty of fraud with intent to evade tax when there was no substantial evidence to support

such ultimate finding. The findings of the Tax Court may otherwise be briefly stated as follows:

Petitioner's decedent was a physician and surgeon practicing in Chattanooga, Tennessee. During the years 1941 to 1947 inclusive his income for those years was understated in his income tax return in the total amount of $121,436.86. He died May 5, 1953. Decedent's practice increased greatly during the years 1941 through 1945 due to the entry into the Armed Forces of many doctors in Chattanooga. He saw an average of 70 to 100 patients per day, and in addition, performed surgical operations. Decedent devoted his constant efforts to his large medical practice.

As a result of the war, personnel turnover in decedent's office was high. The omission of professional income from decedent's cash ledger was due to incompetent employees. Decedent employed a certified public accountant to prepare his income tax returns who obtained his information from decedent's employees with respect to income and expenses on professional income, and from employees of two real estate agents with respect to rent. The accountant never examined decedent's books and records.

The employees in the office were as much as six to seven months behind in their bookkeeping entries but kept this fact from decedent because they feared his reactions. One of the employees gave the accountant gross receipts figures which she knew to be nothing but a guess. Decedent instructed his accountant to obtain and his real estate agents to furnish whatever information was required for income tax purposes. The accountant obtained only that information relative to rents from the realtors and no information to sales of properties.

Investigation of decedent's returns began in June, 1950. Decedent instructed his employees, realtors and his certified public accountant to cooperate fully. He also furnished all available records and banking information.

Decedent gave no personal attention to the keeping of income records, he made no entries on his books, his office personnel kept the records of his professional income and deductions for each year and furnished to the accountant figures purporting to show decedent's income and expenses.

Decedent was well regarded in his community as a man of integrity and high moral character.

The trial court found that a part of the deficiency in each of the years 1941 to 1947 inclusive, was due to fraud with intent to evade tax and ruled therefore that the statute of limitations was not a bar to assessment and collection for the years 1941 to 1945, inclusive.

The Court of Appeals affirmed the Tax Court without citation of authority.

REASONS FOR GRANTING WRIT.

The issues involved in this case have never been decided by this Court. These issues deal with the immensely important subject of fraud penalties under Federal Income Tax Law and a decision by this Court is imperative for the benefit of the public.

The Court of Appeals in the instant case has rendered a decision in conflict with decisions of other Courts of Appeal which constitute a real and embarrassing conflict of opinion and authority between the Courts of Appeal.

The Court of Appeals has decided an important question of Federal Law which has not beeen but should be settled by this Court.

AN IMPORTANT QUESTION OF FEDERAL LAW NEVER SETTLED BY THE UNITED STATES SUPREME COURT IS INVOLVED.

The importance to the public of a construction by this Court of the enforcement penalty provisions of the Internal Revenue Laws is apparent in that such a ruling affects the lives of every citizen. What facts will constitute substantial evidence upon which to base a finding of fraudulent intent to evade tax which will support the fifty (50%) percent penalty has never been decided by this Court. The complex nature of these laws has forced the public to turn to specialized advice in the tax field for aid in preparing their annual income tax return and in a great number of cases almost complete dependence upon such experts.

This Court has never decided how far a taxpayer may go in depending upon expert advice in this field. This Court has never decided whether or not the employment of a dishonest employee or incompetent accountant resulting in errors favorable to the taxpayer will result in imputation to the taxpayer of a violation of Title 26, Internal Revenue Code, Section 293(b).

With daily increases in the complex nature of our Internal Revenue Laws the question here presented is imperative to the public.

Petitioner's contention is that "fraud with intent to evade tax" as contained in Section 293(b) means that the taxpayer must possess the mental intent to defraud. This fraud should not be presumed. In no tax case that we have found decided by this Court has fraud been presumed. The Tax Court and the Court of Appeals held that the taxpayer, although relying upon experts and a certified public accountant, was presumed to possess intent to

defraud where substantial omissions from the taxpayer's return occurred over a period of years from 1941 through 1947. We think this Court should construe the meaning of Title 26, Internal Revenue Code, Section 293(b) and especially the words "fraud with intent to evade tax."

In the instant case the Court of Appeals has held that substantial omission over several years is substantial evidence upon which to base a violation of Section 293(b). This holding negates Title 26 Internal Revenue Code, Section 275(c) which must be construed *in pari materia* with Title 26, Internal Revenue Code, Section 293(b).

The holding of the Court of Appeals in the instant case has construed the above statutes in a manner contrary to the intentions of Congress as evidenced by the express wording within the statutes.

This Court should settle this issue of Federal Law.

THE CIRCUITS ARE IN CONFLICT ON THIS QUESTION.

The Court of Appeals held that decedent *must* have been aware of the extent of his practice and that the gross understatement of his professional income *must* have been apparent to him upon examination of his return (the proof was that he never examined his returns).

The Court of Appeals for the Tenth Circuit holds contrary however in the case of *Davis v. Commissioner*, 184 F. 2d 86, and we feel it imperative to quote from that opinion the following:

> "The Commissioner here argues in effect that the reported income shown by the returns was so small as compared with the actual income and certain deductions were so flagrant that the taxpayers *must have known* that their returns were understated and because of this knowledge there was an intent on their part to evade taxes. With this we cannot agree. * * *

The Tax Court took the position that the taxpayers cannot shift the personal responsibility of making a correct tax return to others. That responsibility of filing a correct return is that of the taxpayer, but a failure to file a correct return does not necessarily constitute fraud. Fraud implies bad faith, intentional wrong doing, and a sinister motive. It is never imputed or presumed and the courts should not sustain findings of fraud upon circumstances which at the most create only suspicion.

It is a matter of common knowledge that very few people are familiar with the income tax law and regulations. Most of them resort to expert advice in the preparation of their returns. The collectors throughout the country have made available numerous trained agents to assist taxpayers in preparing their returns. To hold a taxpayer guilty of fraud who without actual knowledge that a return is false, and after a full disclosure to the expert preparing the same, would be untenable." (Emphasis supplied.)

The Court of Appeals for the Second Circuit also held that a taxpayer in relying upon expert advice and where no actual fraudulent intent was shown was not guilty of fraud with intent to evade tax in the case of *Bronson v. Commissioner*, 183 F. 2d 529.

These cases in holding that a taxpayer could rely upon expert advice held at the same time and as a necessary element that the taxpayer must possess *intent* to defraud before his conduct would be violative of Code Section 293(b).

The Court of Appeals for the Third Circuit in the case of *Delone v. Commissioner*, 100 F. 2d 507, held that the mere omission from income tax returns of items that should have been included over a period of years does not show a fraudulent intent.

The Court of Appeals for the Sixth Circuit in a recent opinion, *Wiseley v. Commissioner*, 185 F. 2d 263, under facts very similar to the present case ruled in direct conflict with their holding in the case presently under consideration.

The Court of Appeals for the Fifth Circuit in the case of *Eagle v. Commissioner*, 242 F. 2d 635, another case where the Commissioner established substantial omission then rested his case depending upon the presumption of correctness thereof including the Commissioner's presumption of fraud, quoted a prior holding with approval at page 638 as follows:

> "No presumption of correctness attached to the Commissioner's findings of unreported income in the determination of the *fraud* issue." (Emphasis supplied.)

Although large amounts of income were unreported in the latter case for several years, the Fifth Circuit reversed the Tax Court's finding of fraud and held that the taxpayer had relied upon an expert to assemble his information and to make his tax return; that though the expert had made substantial errors in favor of the taxpayer there was no evidence of any fraudulent intent.

CONCLUSION.

The weakness of the Court of Appeals' ruling is emphasized by the reflection that experts in the field of taxation, including the various Courts of Appeals, may disagree in the construction, application and bookkeeping procedures of our complex Internal Revenue Laws. Every taxpayer, however, shall *personally* construe correctly or suffer the pain of being branded a defrauder of his government with resulting confiscation of his property to satisfy the applicable penalty provisions as proper atonement for his heinous error.

For the reasons stated that there is conflict within the Circuits on the question here involved; that an important question of interpretation of Federal statutes is here involved which has never been decided by this Court, and that the public interest requires a ruling by this Court on this question, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

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December, 1957.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

PER CURIAM. The Executor of the Estate of Dr. John B. Haskins, deceased, petitions for review of a decision of the Tax Court of the United States holding that there are large deficiencies in income taxes, with the consequence that additions to tax were assessed against the taxpayer for fraudulent failure to report substantial income from the taxpayer's medical practice for the years 1941 to 1947, inclusive. The petitioner concedes the accuracy of the income tax deficiencies as determined by the Commissioner of Internal Revenue, except that, it is contended, collection of the deficiencies assessed for the years 1941 to 1945 is barred by the statute of limitations. The application of the fraud penalty resulting in additional taxes furnishes the main contest on this review. Petitioner contends that the failure of the doctor to make correct income tax returns was not due to intentional fraud, but was occasioned by negligence of employees in his office in not supplying correct data from his office records upon which a Certified Public Accountant, selected by the doctor, made out the returns.

In carefully considered findings of fact, supported by substantial evidence and not clearly erroneous, and in a well-reasoned opinion, the tax court found as a matter of fact that the decedent had fraudulently failed to report accurately his income for the years involved in an attempt to evade taxes. Consequently, the statute of limitations was held not to bar the assessments for the years 1941 to 1945, inclusive. The tax court considered the most sig-

nificant fact in establishing the doctor's fraud to have consisted in his failure to report a very substantial amount of his income from the practice of his profession for the year 1945. His unreported income from his professional services in that year exceeded $47,000, which was more than double the amount actually reported by him. For each of the years 1944 and 1946, his unreported income from his medical practice exceeded $30,000. His unreported professional income for the years 1941, 1942 and 1943, was more than $20,000 for each year. For 1941 and 1944, the amount of his unreported income was double the amount reported.

The tax court pointed out that the doctor was conducting an individual practice and must have been aware of its extent and of the fees he was charging; and that the gross understatement of his professional income must have been apparent to him upon examination of the returns at the time of execution during the seven consecutive years. He also failed to report certain capital gains from real estate transactions.

Petitioner relies upon a decision of this court in *Wisely v. Commissioner*, 185 F. (2d) 263 (C. A. 6). We think the marked difference between the two cases renders them clearly differentiable. As the tax court stated in its opinion, Dr. Wisely, knowing that his income tax returns had only been estimated and realizing that he was in difficulty because of the understatement of his income, secured assistance of friends in procuring personal auditors for his books as soon as possible after he found out from an employee that his income had been greatly understated. He then filed amended returns to correct the originals.

Upon the basis of the findings of fact of the tax court and for the reasons stated in its opinion, the decision of the tax court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed October 25, 1957.)

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.